MAJLIS UGAMA ISLAM PULAU PINANG DAN SEBERANG PERAI

v.

SHAIK ZOLKAFFILY SHAIK NATAR & ORS

FEDERAL COURT, KUALA LUMPUR
HAIDAR MOHD NOOR CJ (MALAYA)
ABDUL MALEK AHMAD FCJ
SITI NORMA YAAKOB FCJ
[CIVIL APPEAL NO: 02-3-2002 (P)]
10 JULY 2003

ISLAMIC LAW: *Jurisdiction - Syariah Court - Will by deceased Muslim - Determination of questions thereon - Whether within realm of Syariah Court's jurisdiction - Prayer for injunction and declaratory relief - Whether would remove case from Syariah Court - 'Subject matter' approach - 'Remedy prayed for' approach - Applicability - Administration of Islamic Religious Affairs Enactment 1993 (Penang), ss. 48(2)(b)(v), (vii) & (ix) - Federal Constitution, art. 121(1A)*

CONSTITUTIONAL LAW: *Courts - Jurisdiction - High Court and Syariah Court - Constitutional amendment - Article 121(1A) - Giving effect to purpose thereof - Prayer for injunction and declaratory relief in respect of will by deceased Muslim - Whether outside jurisdiction of civil court - Administration of Islamic Religious Affairs Enactment 1993 (Penang), ss. 48(2)(b)(v),(vii) & (ix) - Federal Constitution, art. 121(1A)*

CIVIL PROCEDURE: *Pleadings - Striking out - Striking out pleadings on jurisdictional ground - Prayer for injunction and declaratory relief in respect of will by deceased Muslim - Whether not determinable by High Court - Whether could be struck out summarily - Rules of the High Court 1980, O. 18 r. 19(1)(a) Rules of the High Court 1980*

The respondents, who were Muslims, had filed an action in the High Court against the appellant, a body established under the Islamic Religious Affairs Enactment 1993 (Penang) ('the Penang Enactment'), seeking for declaratory relief in respect of a piece of land which formed the subject matter of a will by a deceased Muslim.

Before the learned senior assistant registrar, and subsequently the learned judge, the appellant raised a preliminary objection that the High Court had no jurisdiction to hear the respondents' action, and in the circumstances applied to strike out the action under O. 18 r. 19(1)(a) Rules of the High Court 1980 ('RHC'), *albeit* unsuccessfully. The facts showed that the learned judge, aside from ruling that the action was not obviously unsustainable, further ruled, in respect of the preliminary objection, that the Syariah Court: (i) had no jurisdiction to issue the injunction as applied for by the respondents on the authority of *Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman* ('ground 1'); and (ii) had no power to adjudicate on the will and the deed of settlement in question ('ground 2').

The appellant appealed to the Court of Appeal against the High Court's decision, but the decision was affirmed, on the basis, essentially, that the learned judge was right in adopting the 'remedy prayed for' approach, as opposed to the 'subject matter' approach. Dissatisfied, the appellant applied for, and on being granted leave to appeal to the Federal Court, posed the following question of law for the determination of the apex court, namely: whether "in determining the question regarding a will by a deceased Muslim, the proper court having the jurisdiction to determine it is the Syariah Court".

Held:

Per Haidar Mohd Noor FCJ

[1] The High Court and the Court of Appeal erred in their approach in ruling that the matters before them were within the jurisdiction of the Civil Court. (p 309 c)

[2] The Syariah High Court is seized with jurisdiction by way of s. 48(2)(b)(v), (vii) & (ix) of the Penang Enactment *vis-a-vis* the subject matter before the learned judge. As the matters before the learned judge were expressly conferred within the jurisdiction of the Syariah Court by the Penang Enactment, it was wrong of the learned judge to have considered the two instruments disclosed and concluding, on the principles of an O. 18 application, that 'it is neither plain nor obvious that the claim is obviously unsustainable'. The central issue before him was one of jurisdiction. (pp 302 f-g & 303 d-e)

[3] The approach as taken by *Isa Abdul Rahman* can no longer be supported. As highlighted in *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah*, the Federal Court has adopted the 'subject matter' approach rather than *Isa Abdul Rahman*'s 'remedy' approach. (pp 302 b & 301 c)

[3a] The judgment in *Isa Abdul Rahman* could also give rise to undesirable effect, as a party may, by the inclusion of a prayer for remedy not provided in the law applicable to the Syariah Court, remove a matter, the subject matter of which is within the jurisdiction of the Syariah Court, to the Civil Court. The learned judge, hence, ought to have adopted the 'subject matter' approach rather than the 'remedy prayed for' approach. (p 300 h)

[4] The Court of Appeal fell into the same error as the learned judge in taking 'the remedy prayed for' approach instead of the 'subject matter' approach. It was unfortunate that the Court of Appeal, at the material time, did not have the benefit of considering *Soon Singh*. Had *Soon Singh* been brought for its consideration, it could well have come to a different conclusion. That notwithstanding, we cannot support the decision of the Court of Appeal in respect of ground 1 of the learned judge's decision. (p 303 f-g)

[4a] As for ground (2) of the decision, the reference by the Court of Appeal to *Lim Chan Seng lwn. Pengarah Agama Islam Pulau Pinang & Satu Kes Yang Lain, G. Rethinasamy lwn. Majlis Ugama Islam Pulau Pinang & Anor* and *Mohamed Habibullah bin Mahmood v. Faridah bte Dato' Talib*, is of no help in the face of the clear express provisions of s. 48(2)(b)(v), (vii) & (ix) of the Penang Enactment giving jurisdiction to the Syariah Court. Clearly, the Court of Appeal had fallen into the same error as the learned judge in determining ground (2). (p 304 a-c)

[5] As to what happens when a party may not have his remedy expressly stated in the state law pertaining to Muslims, the answer is, it is not for the courts to legislate and confer jurisdiction to the civil courts but for the State Legislature to provide the remedy. The role of the courts is to interpret the laws, and whenever necessary to give effect to the purpose or object of the laws enacted by the legislatures. Consequently, the purpose or object of the amendment to art. 121 of the Constitution needs to be given effect to. As correctly stated by Abdul Kadir Sulaiman J in *Md Hakim Lee v. Majlis Agama Islam*

Wilayah Persekutuan, Kuala Lumpur "the fact that the plaintiff may not have his remedy in the Syariah Court would not make the jurisdiction exercisable by the Civil Court". (pp 308 h & 309 a-b)

[Appeal allowed. Orders of courts below set aside; applications by appellant under O. 18 r. 19(1) RHC to succeed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden-responden, yang beragama Islam, telah memfail suatu tindakan di Mahkamah Tinggi terhadap perayu, sebuah badan yang ditubuhkan di bawah Enakmen Pentadbiran Halehwal Agama Islam Pulau Pinang, 1993 ('Enakmen Penang'), bagi memohon beberapa relif deklaratori berhubung sebidang tanah yang tertakluk kepada satu wasiat yang dibuat oleh seorang Islam yang sudah meninggal dunia.

Di hadapan penolong kanan pendaftar yang bijaksana, dan kemudiannya hakim yang bijaksana, perayu membangkitkan bantahan awal bahawa Mahkamah Tinggi tidak ada bidangkuasa untuk mendengar tuntutan responden, dan seterusnya memohon untuk mengetepikan tindakan tersebut di bawah A. 18 k. 19(1)(a) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'), walaupun tak berjaya. Fakta menunjukkan bahawa hakim yang bijaksana, selain merumuskan bahawa tuntutan responden bukan merupakan suatu tindakan yang secara jelas tidak dapat dipertahankan, memutuskan selanjutnya, berkaitan bantahan awal, bahawa Mahkamah Syariah: (i) tiada bidangkuasa untuk mengeluarkan injunksi seperti yang dipohon oleh responden, berdasarkan autoriti *Majlis Agama Islam Pulau Pinang lwn. Isa Abdul Rahman* (alasan 1); dan (ii) tiada kuasa untuk mendengarbicara wasiat serta suratikatan penyelesaian yang berkenaan ('alasan 2').

Perayu merayu ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi, tetapi keputusan tersebut telah disahkan atas alasan, secara intinya, bahawa hakim yang bijaksana betul apabila menerimapakai pendekatan 'remedi yang dipohon' berbanding pendekatan 'halperkara'. Merasa tidak puas hati, perayu memohon, dan setelah diberi kebenaran untuk merayu ke Mahkamah Persekutuan, mengemukakan persoalan undang-undang berikut untuk jawapan Mahkamah Puncak, yakni sama ada: "dalam menentukan persoalan mengenai wasiat yang dibuat oleh seorang beragama Islam yang sudah meninggal dunia, mahkamah sewajarnya yang mempunyai bidangkuasa untuk memutuskan hal tersebut adalah Mahkamah Syariah".

Diputuskan:
Oleh Haidar Mohd Noor HMP

[1] Mahkamah Tinggi dan Mahkamah Rayuan silap apabila mengambil pendekatan yang memutuskan bahawa halperkara-halperkara yang berada di hadapan mereka adalah terletak di bawah bidangkuasa Mahkamah Sivil.

[2] Mahkamah Syariah mempunyai bidangkuasa melalui s. 48(2)(b)(v), (vii) & (ix) Enakmen Penang *vis-a-vis* halperkara-halperkara yang berada di hadapan hakim yang bijaksana. Oleh kerana halperkara-halperkara di hadapan hakim yang bijaksana itu, secara nyata, diletak di bawah bidangkuasa Mahkamah Syariah oleh Enakmen Penang, ianya silap bagi hakim yang bijaksana untuk mempertimbang kedua-dua dokumen yang dikemukakan dan merumuskan, di bawah prinsip permohonan A. 18, bahawa 'ianya tidak jelas atau nyata bahawa tuntutan adalah secara nyatanya tidak boleh dipertahankan'. Isu utama di hadapan beliau adalah isu bidangkuasa.

[3] Pendekatan seperti yang diambil oleh kes *Isa Abdul Rahman* tidak lagi boleh disokong. Seperti yang ditekan dalam *Soon Singh Bikar Singh lwn. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah*, Mahkamah Persekutuan telah memilihpakai 'pendekatan halperkara' dan tidak 'pendekatan remedi' *Isa Abdul Rahman*.

[3a] Keputusan dalam *Isa Abdul Rahman* adalah terbuka kepada kesan tidak diingini, oleh kerana sesuatu pihak, dengan memasukkan permohonan bagi remedi yang tiada peruntukan mengenainya dalam undang-undang yang terpakai kepada Mahkamah Syariah, boleh mengalih sesuatu perkara, halperkara mana termasuk ke bidangkuasa Mahkamah Syariah, ke Mahkamah Sivil. Oleh yang demikian, hakim yang bijaksana seharusnya memakai pendekatan 'halperkara' dan tidak pendekatan 'remedi yang dipohon'.

[4] Mahkamah Rayuan melakukan kesilapan yang serupa sepertimana hakim yang bijaksana apabila memilihpakai pendekatan 'remedi yang dipohon' sambil mengetepikan pendekatan 'halperkara'. Adalah malang kerana Mahkamah Rayuan tidak berpeluang untuk mempertimbang kes *Soon Singh*. Sekiranya kes *Soon Singh* dibawa kepertimbangan Mahkamah Rayuan, satu keputusan yang berbeza mungkin dicapai oleh mahkamah tersebut. Walaupun begitu, kami tidak dapat menyokong keputusan Mahkamah Rayuan berkaitan alasan 1 keputusan hakim yang bijaksana.

[4a] Berhubung alasan 2 keputusan, rujukan yang dibuat oleh Mahkamah Rayuan kepada kes-kes *Lim Chan Seng lwn. Pengarah Agama Islam Pulau Pinang & Satu Kes Yang Lain, G. Rethinasamay lwn. Majlis Agama Islam Pulau Pinang & Anor dan Mohamed Habibullah bin Mahmood lwn. Faridah bte Dato' Talib*, tidak membantu mengambilkira peruntukan nyata s. 48(2)(b)(v), (vii) & (ix) Enakmen Penang yang memberi bidangkuasa kepada Mahkamah Syariah. Jelas bahawa Mahkamah Rayuan telah melakukan kesilapan yang sama sebagaimana hakim bijaksana apabila membuat keputusan berkaitan alasan 2.

[5] Berkenaan apa akan berlaku jika remedi sesuatu pihak tidak diperuntukkan secara nyata dalam undang-undang Negeri mengenai orang-orang Islam, jawapannya ialah, ianya bukanlah tugas mahkamah untuk menggubal dan memberi bidangkuasa kepada Mahkamah-Mahkamah Sivil, tetapi menjadi tanggungjawab Badan Perundangan Negeri menyediakan remedinya. Tanggungjawab mahkamah adalah untuk mentafsir undang-undang dan di mana perlu memberi kesan kepada tujuan atau matlamat undang-undang yang dibuat oleh badan-badan perundangan. Oleh hal yang demikian, tujuan atau matlamat art. 121 Perlembagaan hendaklah diberikan kesannya. Sebagaimana yang diperkatakan dengan betulnya oleh Abdul Kadir Sulaiman H dalam *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur*, "fakta bahawa plaintif berkemungkinan tidak mempunyai remedi di Mahkamah Syariah tidak bermakna bidangkuasa tentangnya boleh dilaksanakan oleh Mahkamah Sivil".

[Rayuan dibenarkan; perintah mahkamah-mahkamah dibawah dibatalkan. Permohonan perayu di bawah A. 18 k. 19(1)(a) dibenarkan.]

Case(s) referred to:

Abdul Shaik Md Ibrahim & Anor v. Hussein Ibrahim & Ors [1999] 3 CLJ 539 HC ***(affirmed)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***

G Rethinasamy lwn. Majlis Ugama Islam, Pulau Pinang & Yang Lain [1993] 2 CLJ 605 HC ***(refd)***

Lim Chan Seng lwn. Pengarah Jabatan Agama Islam Pulau Pinang & 1 Kes Yang Lain [1996] 3 CLJ 231 HC ***(refd)***

Majlis Agama Islam Pulau Pinang lwn. Isa Abdul Rahman & Satu Yang Lain [1992] 3 CLJ 1675; [1992] 1 CLJ (Rep) 201 SC ***(ovrd)***

Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur [1997] 4 CLJ Supp 419 ***(affirmed)***

Mohamed Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264 SC ***(ovrd)***
Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 2 CLJ 5 FC ***(affirmed)***
United Malacca Bhd v. Pentadbir Tanah Daerah Alor Gajah and Other Applications [2002] 4 CLJ 177 FC ***(refd)***

Legislation referred to:
Administration of Islamic Religious Affairs Enactment 1993 (Penang), s. 48(2)(b)(v), (vii), (ix)
Federal Constitution, arts. 74, 121(1A)
Interpretation Acts 1948 and 1967, s. 17A
Rules of the High Court 1980, O. 18 r. 19(1)(a)

For the appellant - Ghazi Ishak (Ong Kheng Leong & Abu Bakar As-Sidek); M/s Ghazi & Lim
For the respondent - Zakaria Ariffin (Shaiful Omar Ahmad); M/s Aziz Zakaria Shaiful & Wan

[Appeal from Court of Appeal, Civil Appeal No: P-02-184-97]

Reported by WA Sharif

JUDGMENT

Haidar Mohd Noor CJ (Malaya):
The issue before us is on the question of jurisdiction of the courts, that is, whether the subject-matter before the High Court in Penang is within the jurisdiction of the civil courts or the syariah courts? This demarcation of the jurisdiction of the two courts came about when Parliament in 1988 amended art. 121 of the Federal Constitution ('the Constitution') by the following art. 121(1A):

> (1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

The courts referred to in cl. (1) are the civil courts.

The amendment came into force from 10 June 1988 (Act A 704).

It is not disputed that the respondents (plaintiffs) are Muslims and the appellant (defendant) is a body established under the Administration of Islamic Religious Affairs Enactment of the State of Penang 1993 ('Penang Enactment'), an Enactment concerning the enforcement and administration of Islamic Religious Affairs, regulation and management of the Islamic Religious authority, and related matters. Ordinarily, the parties would come within the civil jurisdiction of the syariah court by virtue of s. 48(2)(b) of the Penang Enactment which provides:

(b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims ...

The subject matter before the High Court Penang, *inter alia*, is in relation to the question of a will by a deceased Muslim. In granting leave to appeal to this court on 23 September 2002, the primary question for determination of this court is:

> In determining the question regarding a will by a deceased Muslim, the proper court having the jurisdiction to determine it is the syariah court.

We heard the appeal on the above primary question on 14 January 2003 and answered the question in the affirmative. We accordingly allowed the appeal with costs and set aside the order of the Court of Appeal which affirmed the order of the High Court. We now proceed to give our reasons.

In their writ action in the High Court the respondents seek the following:

11. (a) Suatu Deklarasi menyatakan bahawa tanah dan hereditamen yang dahulunya dikenali sebagai Lot No. 55(1), Mukim 13, Daerah Timur Laut, Pulau Pinang terkandung di dalam Geran No. 477 dan 1767 dan sekarang dikenali sebagai Lot No. 1396 terkandung dalam Geran (First Grade) No. 23631 berserta dengan sekeping Lot lagi yang dahulunya dikenali sebagai Lot No. 193 (2), Bandar Georgetown, Daerah Timur Laut, Pulau Pinang dan sekarang dikenali sebagai Lot No. 962, Seksyen 3, Bandar Georgetown terkandung dalam Geran (First Grade) No. 21582.

Dikembalikan kepada Pesaka Sheik Eusoff Bin Shaik Latiff, Simati.

(b) Perintah selanjutnya meletakkan hak atas nama Plaintif-Plaintif sebagai Pemegang Amanah kepada Harta Pesaka Sheik Eusoff Bin Sheik Latiff, Simati kesemua tanah dan hereditamen yang dahulunya dikenali sebagai Lot No. 55(1), Mukim 13, Daerah Timur Laut, Pulau Pinang yang terkandung dalam Geran No. 477 dan 1767 dan sekarang dikenali sebagai Lot No. 1396 terkandung dalam Geran (First Grade) No. 23631 serta dengan Lot No. 193 (2), Bandar Georgetown, Daerah Timur Laut, Pulau Pinang yang sekarang dikenali sebagai Lot No. 962, Seksyen 3, Bandar Georgetown terkandung dalam Geran (First Grade) No. 21582.

(bb) Defendan-Defendan hendaklah menunjukkan suatu akaun yang menyatakan kesemua wang yang diterima dan perbelanjaan ke atas hartanah yang dikenali sebagai Lot No. 962, Seksyen 3, Bandar Georgetown, Penang dan Lot 1396, Daerah Timur Laut, Penang.

SECARA ALTERNATIF

(c) Gantirugi.

(d) Suatu Injunksi menahan Defendan atau orang suruhannya atau sesiapa sahaja dari menjual, memindahmilik atau campurtangan atau sebarang tindakan atau urusan ke atas tanah dan hereditamen yang dahulunya dikenali sebagai Lot 55(1), Mukim 13, Daerah Timur Laut, Pulau Pinang yang terkandung dalam Geran No. 477 dan 1767 dan sekarang dikenali sebagai Lot No. 1396 terkandung dalam Geran (First Grade) No. 23631 serta dengan Lot No. 193 (2), Bandar Georgetown, Daerah Timur Laut, Pulau Pinang yang sekarang dikenali sebagai Lot No. 962, Seksyen 3, Bandar Georgetown terkandung dalam Geran (First Grade) No. 21582 sehingga tindakan di dalam guaman ini selesai.

(e) Kos.

(f) Faedah.

(g) Apa-apa Perintah atau relif yang difikirkan adil dan patut oleh Mahkamah yang mulia.

(Translation)

11 (a) A declaration that the piece of land previously known as Lot No. 55(1), Mukim 13, Daerah Timur Laut, Pulau Pinang held under Grant No. 477 and 1767 and now known as Lot No. 1369 held under Grant (First Grade) No. 23631 and another piece of land previously known as Lot No. 193 (2), Georgetown, Daerah Timur Laut, Pulau Pinang and now known as Lot No. 962, Seksyen 3, Georgetown held under Grant (First Grade) No. 21582.

Be surrendered to the Estate of Sheik Eusoff bin Shaik Latiff, Deceased.

(b) Further order that the piece of land and its hereditament thereunder previously known as Lot No. 55(1), Mukim 13, Daerah Timur Laut, Pulau Pinang held under Grant No. 477 and 1767 and now known as Lot No. 1396 held under Grant (First Grade) No. 23631 and another piece of land previously known as Lot No. 193 (2), Georgetown, Daerah Timur Laut, Pulau Pinang and now known as Lot No. 962, Seksyen 3, Georgetown held under Grant (First Grade) No. 21582 be vested upon the Plaintiffs as executors of the deceased's estate.

(bb) Defendants do show the plaintiffs an account of all monies received or expended on the lands known as Lot No. 962, Seksyen 3, Georgetown, Pulau Pinang and Lot No. 1396, Daerah Timur Laut, Pulau Pinang.

ALTERNATIVELY

(c) Damages.

(d) An injunction restraining the Defendants by themselves or by their servants or by their agents from selling, charging, transferring or in anyway dealing with the lands and its hereditament previously known as Lot No. 55(1), Mukim 13, Daerah Timur Laut, Pulau Pinang held under Grant No. 477 and 1767 and now known as Lot No. 1396 held under Grant (First Grade) No. 23631 together with Lot No. 193 (2), Georgetown, Daerah Timur Laut, Pulau Pinang and now known as Lot No. 962, Seksyen 3, Georgetown held under Grant (First Grade) No. 21582 until the disposal of this suit.

(e) Costs.

(f) Interests.

(g) Such Order or relief as this Honourable Court thinks fit and proper.

The appellant in para. 2 of its defence raised by way of preliminary objection that the High Court has no jurisdiction to hear the respondents' action.

Arising from its stand, the appellant filed an application under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 and the inherent jurisdiction of the court to strike out the respondents' action. The application was heard by the learned senior assistant registrar who dismissed it with costs. On appeal by the appellant, the learned judge dismissed it with costs and affirmed the order of the senior assistant registrar. Thereafter the appeal of the appellant before the Court of Appeal was also dismissed with costs. Hence, with leave, the present appeal to this court.

Decision Of The High Court

The learned judge went on at considerable length to consider the principles involved in an O. 18 application. With respect, we are of the view that the learned judge should have focused his mind more on the primary issue of jurisdiction as per the application of the appellant filed therein. If there are merits in the appellant's application, that would be the end of the matter.

Be that as it may, the learned judge in dismissing the appellant's application relied on two grounds. They are:

(1) the syariah court had no jurisdiction to issue the injunction applied for by the respondents; and

(2) the syariah court has no power to adjudicate on the will and the deed of settlement.

In respect of ground (1), the learned judge relied on the Supreme Court case of *Majlis Agama Islam Pulau Pinang lwn. Isa Abdul Rahman & Satu Yang Lain* [1992] 3 CLJ 1675; [1992] 1 CLJ (Rep) 201 as the authority for the approach to be taken, that is, by looking at the relief sought to determine if the syariah court is vested with jurisdiction.

In *Isa Abdul Rahman*, the real order asked for by Isa Abdul Rahman was a perpetual injunction to restrain Majlis Agama Islam Pulau Pinang or its agents from demolishing a mosque on a land which the original owner had given as 'wakaf am' for the purpose of erecting a commercial building on the site. After examining the provisions of the then Administration of Muslim Law Enactment 1959 (Penang), the Supreme Court found that the Chief Kadi and the Court of Kadi did not have jurisdiction to issue the injunction applied for by the respondents. The Supreme Court ruled that *Isa Abdul Rahman*'s claim for perpetual injunction could only be heard by the High Court.

When this case was heard by the learned judge, he did not have the benefit of the judgment of this court in *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5, a case involving conversion out of Islam which was decided later.

Abdul Hamid Mohamad, J (as he then was) had the occasion in *Abdul Shaik bin Md. Ibrahim & Anor v. Hussein bin Ibrahim & Ors* [1999] 3 CLJ 539 to consider the case of *Isa Abdul Rahman* and *Soon Singh*. *Abdul Shaik bin Md. Ibrahim* relates to prayers for declarations, *inter alia*:

(a) that the adoption of the child and the registration thereof under the Registration of Adoption Act, 1952 was null and void and an order that the adoption and the registration thereof be cancelled;

(b) an order that the first and second defendants return the child to the plaintiffs or alternatively that the plaintiffs be granted access to the child.

In *Abdul Shaik bin Md. Ibrahim*, Abdul Hamid Mohamad, J held that the case is not removed from the jurisdiction of the syariah court merely because the plaintiffs have prayed for the remedy of declarations. His Lordship did not follow *Isa Abdul Rahman* but followed *Soon Singh* which adopted the 'subject matter' approach rather than the 'remedy prayed for' approach. It would be helpful to quote the approach taken by Abdul Hamid Mohamad, J (pp. 546 and 547):

> The other point is in determining whether the matter before the court falls under the jurisdiction of which court, the syariah or this court, should the court look at the subject matter of the action or the remedies prayed for.
>
> This issue is relevant in this case because the first two prayers of the plaintiffs are for declarations.
>
> In *Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman & Satu Yang Lain*, the subject matter of the suit was 'wakaf'. The plaintiff/appellant prayed for an injunction. The Supreme Court held that the claim could only be heard by the High Court. The reason is that the Administration of Muslim Law Enactment 1959 (Penang) did not provide for the remedy of injunctions and therefore the syariah court in Penang does not have the jurisdiction to issue an order of injunction. The remedy of injunction is provided by the Specific Relief Act 1950 (and the rules are to be found in O. 53 RHC 1980) which power is given to the High Court. Therefore, a claim for perpetual injunction can only be heard by the High Court. That is what that case decides.
>
> It must be pointed out even under the Administration of Muslim Law Enactment 1993 which replaced the 1959 Enactment, there is no provision for the remedy of injunction or declaration and, until today, there is still no Civil Procedure Rules or Enactment for the syariah courts in Penang. However, there is provision for a specific kind of injunction, that is, injunction against molestation under s. 107 of the Islamic Family Law Enactment 1985 (Penang) which is not applicable here. So, if I were to adopt the approach laid down in *Isa Abdul Rahman* regarding the two prayers, even at the outset the syariah court has no jurisdiction to grant them.
>
> I have, with the greatest of respect to the Supreme Court, pointed out in *Lim Chan Seng* that the judgment may give rise to an undesirable effect: a party may by the inclusion of a prayer for a remedy not provided in the law applicable to the syariah court, remove a matter, the subject matter of which is within the jurisdiction of the syariah court, to the civil court.

It appears to me that the Federal Court has now adopted the 'subject matter' approach rather than the 'remedy prayed for' approach. This is to be found in the passage which I have reproduced earlier which perhaps I may be excused for reproducing part of it again:

> ... whilst we agree with the approach adopted by Abdul Hamid J following *Habibullah*, that when there is a challenge to jurisdiction the correct approach is to look at the State Enactments to see whether or not the syariah courts have been expressly conferred jurisdiction **on a given matter** ... (emphasis added.)

It is also important to note that in *Soon Singh*'s case itself the remedy sought was for a declaration. Yet, the Federal Court considered the question of jurisdiction purely on the 'subject matter' approach.

In the circumstances, I think I am no longer bound by *Isa Abdul Rahman*'s case. Therefore, in this case the fact the remedy prayed for in two of the prayers is, ie declaration does not remove the case from the jurisdiction of the syariah court. In other words, in the present case I do not hold that the syariah court has no jurisdiction over this matter merely because the plaintiffs have prayed for the remedy of declaration.

Though, the Federal Court in *Soon Singh* agreed with the approach by Abdul Hamid Mohamad, J in *Lim Chan Seng lwn. Pengarah Jabatan Agama Islam Pulau Pinang & 1 Kes Yang Lain* [1996] 3 CLJ 231 following *Mohamed Habibullah bin Mahmood v. Faridah bte Dato' Talib* [1993] 1 CLJ 264, it went on to say (at p. 22) "we do not agree with his Lordship's conclusion that since the Penang Enactment did not expressly confer jurisdiction on the syariah court over the matter raised, there was no impediment for the civil court to hear and dispose of the matter."

However, Abdul Hamid Mohamad, J in his ruling in *Abdul Shaik bin Md. Ibrahim* that the civil court had the jurisdiction to declare that the adoption of the child and the registration thereof under the Registration of Adoption Act 1952 were void and that the registration should be annulled, found that s. 31 of the Adoption Act 1952 excludes its operation from Muslims.

According to Abdul Hamid Mohamad, J (at p. 547) "The reason why Muslims are excluded from the operation of the Adoption Act 1952 is obvious. The effect of adoption under the Act is repugnant to Islamic Law". His Lordship went on further to say that the Registrar of Adoption has wrongly applied it on a Muslim child. Hence, his Lordship was of the view that it was within the jurisdiction of the civil court to declare that the Registrar of Adoption was wrong when he applied the Adoption Act 1952 to Muslims.

His Lordship went on further to allow the prayer for the return of the child to the plaintiff and the alternative prayer for access with a rider that the plaintiff should file a fresh action in the syariah court for custody as it was a matter clearly within the jurisdiction of the syariah court.

We respectfully agree with Abdul Hamid Mohamad, J that *Isa Abdul Rahman* cannot be supported.

In respect of ground (2), this is what the learned judge, after considering the pleadings before him, said:

> Disclosed therefore are 2 opposing versions regarding the said land. While the Plaintiffs have it that the said land should revert to the estate of the deceased, the Defendant has it that the said land should remain as "wakaf" land. Also disclosed are 2 instruments of the deceased, to wit, a will dated 30.12.1892 allegedly providing that the said land shall be reserved as a "wakoff" for the benefit of "Shaik Eusoff's mosque" during the lifetime of ... (wife and children) and for a period of 21 years after the demise of the last survivor, and a deed of settlement No. 84/1890 dated 26.6.1890 allegedly providing that the said land shall be "wakafkan" as a cemetery for the deceased, his family and for persons professing the Islamic faith in Penang.

The learned judge in considering the principles in an O. 18 application concluded:

> Plainly, when considering alone the allegations in the pleadings, it is neither plain nor obvious that the claim is obviously unsustainable. Indeed, neither the claim nor the defence is not without some chance of success.

With respect, the learned judge, in our view, fell into error here as the primary ground of the appellant in its application to strike out the writ by the respondents is anchored on the jurisdiction of the civil court to hear the matters before it.

Clearly, if we examine the Penang Enactment, it seems clear to us that a Syariah High Court is seized of jurisdiction by way of s. 48(2)(b)(v), (vii) and (ix) of the Penang Enactment *vis-a-vis* the subject matter before the learned judge. In so far as is relevant s. 48(2)(b)(v), (vii) and (ix) of the Penang Enactment reads:

> (b) in its civil jurisdiction hear and determine all actions and proceedings in which all the parties are Muslims and which relate to:

(i)

(ii)

(iii)

(iv)

(v) Wills or death-bed gifts (marad-al-maut) of a deceased Muslim;

(vi) ...

(vii) Wakaf or nazar;

(viii) ...

(ix) the determination of the persons entitled to share in the estate of a deceased Muslim or of the shares to which such persons are respectively entitled; or

(x) ...

As the matters before the learned judge are expressly conferred within the jurisdiction of the syariah court by the Penang Enactment, and with respect, quite apart from what we said earlier that the learned judge should have taken the 'subject matter' approach rather than the "remedy prayed for" approach, it was wrong for the learned judge to consider the two instruments disclosed and concluding that on the principles in an O. 18 application 'it is neither plain nor obvious that the claim is obviously unsustainable'. The central issue before him is one of jurisdiction.

Decision Of Court Of Appeal

With respect, the Court of Appeal, in our view, fell into the same error as the learned judge in taking 'the remedy prayed for' approach instead of the 'subject matter' approach. It was unfortunate that the Court of Appeal did not have the benefit of considering *Soon Singh*. *Soon Singh* was available at the time when the Court of Appeal heard this appeal. Had *Soon Singh* being brought for the consideration of the Court of Appeal, it could well have come to a different conclusion or finding.

Be that as it may, for the reasons stated earlier, we cannot support the decision of the Court of Appeal in respect of ground (1) of the learned judge.

In respect of ground (2), with respect, the reference by the Court of Appeal to *Lim Chan Seng lwn. Pengarah Jabatan Agama Islam Pulau Pinang & 1 Kes Yang Lain* [1996] 3 CLJ 231, *G. Rethinasamy lwn. Majlis Ugama Islam, Pulau Pinang & Satu Yang Lain* [1993] 2 CLJ 605 and *Mohamed Habibullah bin Mahmood v. Faridah bte Dato' Talib* [1993] 1 CLJ 264 is of no help in the face of the clear express provisions under s. 48(2)(b)(v), (vii) and (ix) of the Penang Enactment giving jurisdiction to the syariah court.

With respect, the Court of Appeal fell into the same error as the learned judge in determining ground (2).

In any event, with the state of uncertainty over the approach to be taken when a challenge is mounted on the issue of jurisdiction, we are of the view that it is perhaps appropriate for us to examine the relevant authorities on this issue.

Harun Hashim SCJ, in *Mohamed Habibullah* was of the opinion, that when there was a challenge to jurisdiction, the correct approach was to firstly see whether the syariah court has jurisdiction and not whether the state legislature has power to enact law conferring jurisdiction on the syariah court.

In *Soon Singh*, the Federal Court is of the view that even if there is no express provision in the State Enactment conferring jurisdiction on the syariah court, the Federal Court took the 'implication approach' in considering the issue of jurisdiction. Mohamed Dzaiddin, FCJ (as he then was) stated at p. 22 in *Soon Singh* thus:

> It is quite clear to us that the legislative purpose of the State Enactments and the Act is to provide a law concerning the enforcement and administration of Islamic law, the constitution and the organization of the syariah courts and related matters. Therefore, when jurisdiction is expressly conferred on the syariah courts to adjudicate on matters relating to conversion to Islam, in our opinion, it is logical that matters concerning conversion out of Islam (apostasy) could be read as necessarily implied in and falling within the jurisdiction of the syariah courts.

We respectfully agree with this approach. But what happens in a situation where there is no expression provision at all in the State Enactment giving jurisdiction to the syariah court on any particular subject matter but the subject matter is within the competence of the state legislature to enact, that is to say, in particular para. 1 of the Second List (State List) in the Ninth Schedule to the Constitution under the caption 'Legislative Lists'?.

In *Soon Singh* there is an express provision on the conversion to Islam but not on renunciation of Islam and hence the implication approach. The answer, in our view, is provided by Abdul Kadir Sulaiman, J (as he then was) in *Md. Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1997] 4 CLJ Supp 419. Though, in *Md. Hakim Lee* the learned judge took a wider approach in interpretating the issue of jurisdiction, by reference to para. 1 of the Second List called the State List read with art. 74 of the Constitution when the issue of art. 121(1A) of the Constitution before his Lordship was in respect of the Administration of Islamic Law (Federal Territories) Act 1993 (a federal legislation), the wider approach taken by His Lordship equally applied to the Penang Enactment. In this respect, we quote the relevant passage of the judgment of his Lordship in Md. Hakim Lee (at pp. 425-429):

> In *Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang & Anor* [1996] 3 CLJ 231, my learned brother held the view to the contrary. He held that the syariah court is not a creature of syariah law (hukum syarak). It owes its existence to the written laws of Parliament and state legislatures. As such, it is his view that in order to ascertain the question of jurisdiction of the syariah court, it is incumbent that reference be made to these laws and see whether jurisdiction over the particular matter is given to the syariah court or the civil court. While it is true that the constitution, organization and procedure of the syariah court is to be so provided by the respective state legislature as so stated in para 1 of the State List read with art 74 of the Federal Constitution, the issue at hand is not one of the constitution, organization and procedure of the syariah court. The issue is a substantive one which a syariah court, having jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in para 1 of the State List, has the power to adjudicate, and as pointed out earlier, the prayers sought in the application is one touching on the personal law of persons professing the religion of Islam. Therefore, with respect, it cannot be true to say that in order to ascertain the question of jurisdiction of the syariah court, reference be made only to the respective laws enacted by the state legislature to see whether jurisdiction over the particular matter is given to the syariah courts or the civil courts provided in art 121(1) of the Constitution. To see the jurisdiction of the syariah court, List II of the Ninth Schedule to the Federal Constitution should not be interpreted so narrowly in the light of the overall jurisdiction given by the Constitution in List II that the syariah court shall have jurisdiction over persons professing the religion of Islam in respect of matters stated therein. In *Mohamed Habibullah*'s case, Harun Hashim SCJ at p. 268 said:

> It is obvious that the intention of Parliament by art 121(1 A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the syariah court: *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1. I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is to firstly see whether the syariah court has jurisdiction and not whether the state legislature has power to enact the law conferring jurisdiction on the syariah court. The validity of a state law can only be questioned in a separate proceeding under art 4(3) of the Federal Constitution ... And by art 4(4) read with art 128, only the Supreme Court may declare any such law invalid in the proceedings referred to in art 4(3). (emphasis added).

...

The jurisdiction of the syariah courts given by the Act, in the light of the provisions provided by para 1 of List II mentioned earlier, cannot in any way limit the wider jurisdiction of the courts to deal over persons professing the religion of Islam in respect of any of the matters included in para 1 thereof, as construed narrowly by my learned brother in *Lim Chan Seng*, by the mere fact that the jurisdiction to decide on the matter of the application of the plaintiff here is not so expressly stated in the Act. If I may call, the wider jurisdiction given by para 1 of List II to the Ninth Schedule to the Constitution is the jurisdiction inherent in the syariah court, subject of course to the right to exercise that jurisdiction being expressly given by the Act which power is within the competency of the legislature to do under art 74.

Harun Hashim SCJ in *Mohamed Habibullah*'s case took the objective view of the Constitution thus, at p. 271:

> Taking an objective view of the Constitution, it is obvious from the very beginning that the makers of the Constitution clearly intended that the Muslims of this country shall be governed by Islamic family law as evident from the Ninth Schedule to the Constitution... Indeed, Muslims in this country are governed by Islamic personal and family laws which have been in existence since the coming of Islam to this country in the 15th century. Such laws have been administered not only by the syariah courts but also by the civil courts. What art 121 (1A) has done is to grant exclusive jurisdiction to the syariah courts in the administration of such Islamic laws. In other words, art 121(1A) is a provision to prevent conflicting jurisdictions between the civil courts and the syariah courts.

Gunn Chit Tuan SCJ in *Mohamed Habibullah*'s case, in response to the submission by learned counsel, said at p. 285:

> With respect to the submission of Mr Balwant Singh Sidhu regarding whether the plaintiff could be considered an apostate, reference ought to be made to the dictum of Mohamed Yusoff SCJ (as he then was) in the recent decision of this court in *Dalip Kaur v. Pegawai Palis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77, when it was pointed out that in determining whether a Muslim has renounced Islam, the only forum qualified to answer the question is the syariah court.

Citing *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77, Mohd Azmi SCJ in *Mohamed Habibullah*'s case had this to say at p. 279:

> In *Dalip Kaur v. Pegawai Polis Daerah Bukit Mertajam*, Mohamed Yusoff SCJ, has also expressed the following views:
>
> > It is apparent from the observation made by the learned judicial commissioner that the determination of the question whether a person was a Muslim or had renounced the faith of Islam before death, transgressed into the realm of syariah law which needs serious consideration and proper interpretation of such law. Without proper authority to support his contention, it is not sufficient to say whether there is or there is not a condition precedent for a person to become a Muslim; or that if the deceased were proved to have had said his prayers at a Sikh temple he was definitely an apostate.
> >
> > The present question, in my view, cannot be determined by a simple application of facts as has been found by the learned judicial commissioner on the basis of veracity and relevancy of evidence according to civil law. Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.
> >
> > On this view, it is imperative that the determination of the question in issue requires substantial consideration on the Islamc Law by relevant jurist qualified to do so. **The only forum qualified to do so is the syariah court.** (emphasis added).

> Therefore, on the principle adumbrated in *Mohamed Habibullah* and *Dalip Kaur v. Pegawai Polis Daerah, Balai Palis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77, I am more convinced of my view expressed earlier that this matter of the plaintiff which involves the determination of his status upon his purported renunciation of the Islamic faith by the deed poll and the statutory declaration is outside the jurisdiction of this court to determine, on account of the ouster of the jurisdiction by art 121(1A) of the Federal Constitution. By virtue of para 1 in List II of the Ninth Schedule to the Federal Constitution, the jurisdiction lies with the syariah court on its wider jurisdiction over person professing the religion of Islam even if no express provisions are provided in the Act because under art 74 of the Constitution, it is within the competency of the legislature to legislate on the matter. Its absence from the express provision in the Act would not confer the jurisdiction in the civil court. The fact that the plaintiff may not have his remedy in the syariah court would not make the jurisdiction exercisable by the civil court.

Abdul Kadir Sulaiman, J in our view, rightly took the wider approach by preferring to follow Wan Adnan, J (as he then was) in *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1994] 2 CLJ 107 and later affirmed by the Federal Court ([1999] 2 CLJ 5) and did not follow *Lim Chan Seng*, in which the learned judge there took a narrow approach. We would respectfully add that the wider approach is in keeping with the purposive approach which has been given legislative recognition by s. 17A of the Interpretation Act 1948 and 1967 and reads:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

In the circumstances, we would respectfully say that we cannot support the narrow approach taken by Harun Hashim SCJ in Mohamed Habibullah at p. 268:

> I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is firstly to see whether the Syariah Court has jurisdiction and **not whether the state legislature has power to enact the law conferring jurisdiction on the syariah court.** (emphasis added)

The question that may flow from the judgment of Abdul Kadir Sulaiman, J, which we agree, would be what happens when a party may not have his remedy expressly stated in the state law pertaining to Muslims?. The answer, in our view, is not for the courts to legislate and confer jurisdiction to the civil courts but for the state legislature to provide the remedy. The role of

the courts is to interpret the laws and whenever necessary to give effect to the purpose or object of the laws enacted by the legislatures, (see *United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah and Other Applications* [2002] 4 CLJ 177; *Chor Phaik Har v. Farlim Properties Sdn. Bhd.* [1994] 4 CLJ 285). We need therefore to give effect to the purpose or object of the amendment to art. 121 of the Constitution. As correctly stated by Abdul Kadir Sulaiman, J for which we agree, we requote what his Lordship said at p. 429: 'The fact that the plaintiff may not have his remedy in the syariah court would not make the jurisdiction exercisable by the civil court.'

In our view, the High Court and the Court of Appeal erred in their approach in ruling that the matters before them are within the jurisdiction of the civil court. Hence we could not in the circumstances upheld their judgments.

For the reasons stated by us, we allowed the appeal and set aside the orders of the courts below. It must follow that the application of the appellant before the High Court under O. 18 must necessarily succeed and be allowed and we so ordered accordingly. Costs here and in the courts below to the appellant. The deposit to be refunded to the appellant.